

Interim Report of the Sacramento County 1993-1994 Grand Jury

The Sacramento Metropolitan Cable Television Commission

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March 1, 1994

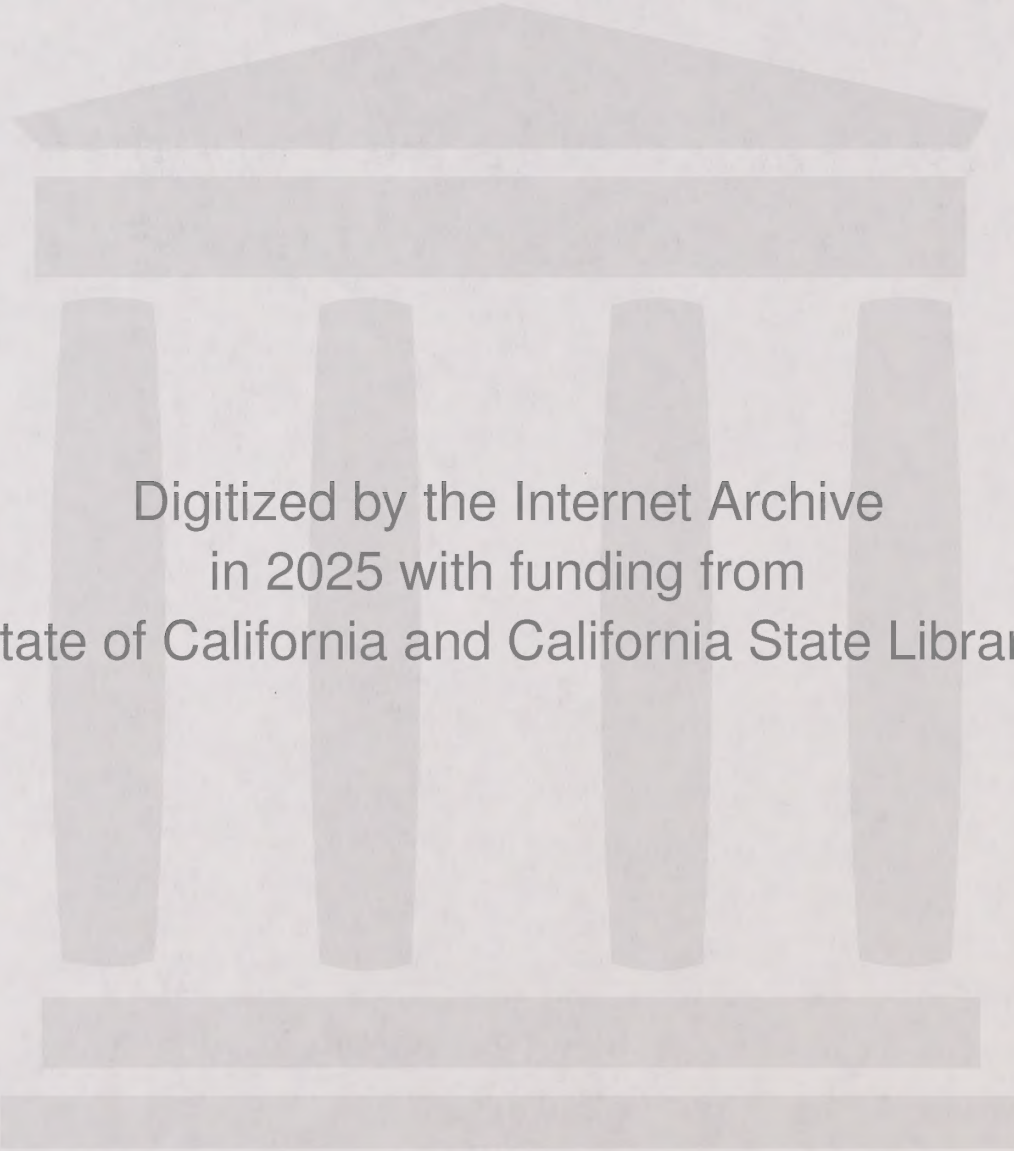
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Interim Report of the Sacramento County 1993-1994 Grand Jury on The Sacramento Metropolitan Cable Television Commission

Subject of Investigation

The Sacramento Metropolitan Cable Television Commission (SMCTC) is a joint powers agency of the City of Sacramento, the County of Sacramento, the City of Folsom and the City of Galt. The Commission currently consists of eight members. Four are members of the County Board of Supervisors, three are members of the Sacramento City Council and one member represents the Galt and Folsom city councils.

Commission activities are governed by the Cable Television Franchise Ordinance, Cable Television License Ordinance, and the Cable Franchise Resolution as well as applicable state and federal laws and rules. The Commission's stated purposes include that it:

- Administer cable television franchise and licenses in Sacramento County for the benefit of the community of Sacramento,

- Assist consumers in resolving cable problems,
- Monitor community programming grantees and
- Operate the local government channel (14).

The Commission has five permanent staff positions. The Executive Director serves at the pleasure of the Commission. The Commission contracts for legal counsel to provide advice on governing and regulatory matters and representation in litigation.

The SMCTC is financed by a percentage of the gross revenues of the cable television companies in Sacramento. No tax dollars are used to fund the 1993-1994 operating budget of approximately \$521,000.

Reason for Investigation

In October 1992, Congress enacted The Cable Television Consumer Protection and Competition Act. It imposed new regulatory standards on cable operators and renewed the regulatory enforcement role of the local franchising authority. The Act amended laws governing cable operators, systems and franchising authorities. Under the Act, the SMCTC is to establish and enforce reasonable rates and customer service standards.

The SMCTC has adopted regulations to administer and enforce customer service standards and subscriber rates of the cable systems and operators in the city and county of Sacramento. The regulations were discussed with, revised and agreed upon by the cable franchisees. In its regulations dealing with compliance failures and violations, the SMCTC gives preference to providing for credits and refunds to customers over penalty payments to the Commission.

In November 1993, the Executive Director to the Commission presented information to the SMCTC for it to determine whether there was "probable cause to believe that Sacramento Cable Television has wrongfully, knowingly, and intentionally failed, neglected and refused to comply with your Regulations; and having made a probable cause determination, refer the matter to an administrative hearing officer." The Commission voted there was probable cause and referred the matter to a hearing officer for findings and proposed decision. This action was taken after informal efforts to resolve and rectify the alleged violations failed. Specifically, Sacramento Cable Television is alleged to have overcharged over 14, 000 cable subscribers for three channels they were not receiving.

The record of the discussion of this issue by the SMCTC and subsequent Commission meetings raises several substantive concerns:

Finding One

Several Commission members acknowledged they had been contacted by and held discussions with representatives of Sacramento Cable Television on the issue before them. Communication between the public and interest groups is a legal and common practice among elected officials, with certain specific exceptions. By law, (Government Code Sections 54950 *et. seq.*, the Brown Act) generally all aspects of the decision-making process by multi-member state and local legislative bodies must be conducted in public with advance written notice. The law applies to boards and commissions created by statute or ordinance, and thus, govern the deliberations of the SMCTC.

The Brown Act makes few exceptions to the mandate for open meetings to maximize the public's access to activities of local bodies while recognizing the need for secret candor, debate and information gathering. Individual Commission members are generally not restricted from meeting with citizens, lobbyists, or the media to discuss substantive issues when less than a quorum of the body is present provided the members do not discuss matters among themselves which are, or potentially may be, before their body. However, case law and Attorney General Opinions caution members of legislative bodies to make certain their participation in

any such discussions do not infringe upon the public's right to witness information acquisition, deliberation and decision-making on matters of public business.

Due process rights in quasi-judicial proceedings, such as those which may come before the SMCTC, may further restrict even those communications which are permitted by the Brown Act. Other regulatory and enforcement bodies have taken steps to adopt guidelines or regulations to restrict communications on enforcement matters. The California Public Utilities Commission (PUC), for example, requires disclosure of *ex parte* communications in PUC proceedings concerning complaints and investigations into violations of rules it is charged with enforcing. It further prohibits all *ex parte* communications in the final phases of the enforcement proceedings.

Ex parte communications include correspondence or oral contact between Commission members and a party in an enforcement proceeding which is off the record and without opportunity for all parties to participate in the communication. The responsibilities of the SMCTC as a regulatory body have not been articulated insofar as how and whether communications between members and subjects of enforcement proceedings are conducted.

Recommendation One

The Grand Jury believes that to properly ensure a complete and accurate record of the facts and considerations in compliance determination matters which come before the Commission, the SMCTC should adopt

a policy on ex parte communications in this quasi-judicial role using the Public Utilities Commission or other regulatory bodies' policies as models for a policy pertinent to its own function.

Finding Two

Amendments to the Brown Act, effective April 1, 1994, may impose new restrictions on communications outside of regular Commission meetings. Government Code Section 54952.2 defines "meeting" to include "any use of direct communications, personal intermediaries, or technological devices that is employed by a majority of the members of the legislative body to develop a

collective concurrence as to the action to be taken on an item by the members of the legislative body." This language and case law prohibit serial meetings when such briefings or discussions are part of the deliberative process and members reach their decisions through private communications outside of the public eye.

Recommendation Two

The Grand Jury believes the SMCTC has a heightened responsibility to be extremely cautious in its communications with persons and interests outside of its open meetings in view of its regulatory role and the substantial monetary impact its decisions have on the public cable subscribers and the franchisees. The Grand Jury recommends the Commission seek legal counsel's advice on the meaning

of new Section 54952.2 which defines "meeting" for purposes of ensuring public participation and access to the decision-making process of public bodies. The Brown Act permits public bodies to impose upon itself more stringent requirements if appropriate, and the Grand Jury recommends the SMCTC do so upon advice of counsel.

Finding Three

Common law doctrine generally requires that public officials exercise their duties and powers with disinterested skill and for the benefit of the public.

Conflict of interest laws (Government Code Sections 87100 *et. seq.*, the Political Reform Act) disqualify public officials from participating in government decisions in which they have a financial interest, limit the receipt of certain gifts and require public disclosure of their economic interests. Apart from these financial considerations, it does not cover other types of conflict of interest or standards of ethical conduct for public officials.

State law establishes certain activities that are incompatible or in conflict with a public

employee's duties, including accepting favors, remuneration, or other forms of compensation. In general, elected officials are exempt from the Government Code Section 1125 *et. seq.*, since elected officials are not appointed to their positions and, thus, are not employees.

For most individuals in public employment, the law prohibits conflicts of interest such as receiving, directly or indirectly, *any* consideration – such as money, favors, gifts or entertainment – for the performance of an act from anyone who is doing business, or is seeking to do business of any kind with a public agency, when it could reasonably be inferred that the gift was intended as a reward for any official action on the public employee's part.

Recommendation Three

The Grand Jury recommends that standards of ethical conduct, as required by Government Code Section 1125 et. seq., be adopted by the SMCTC similar to those general standards which are in place for public employees. With special concern for the potential for members of the SMCTC whose rule-making decisions and regulatory actions have substantial financial consequences to the companies it regulates and the consumers it is mandated to protect, the Grand Jury believes it is

important that the Commission insulate itself from any potential or real conflict by adopting an Incompatible Activities policy. In connection with the protections from economic interests having any influence on officials' decision-making, adoption of general conflict of interest rules underscores the Commission's intent and responsibility to act in the public interest for the benefit of the Sacramento community and its citizens.

General Comments

In the near future the SMCTC will be considering Sacramento Cable Television's benchmark rates schedule. It is important to recognize that each one cent in the rate structure is worth a projected value of \$25 million in either revenues to the operator or savings to the cable subscribers. Expert advice and assistance to the SMCTC from staff and legal counsel will be essential to ensuring a fair and reasonable rate structure over the term of the franchise agreement with Sacramento Cable Television, which runs through the year 2023.

The Grand Jury reviewed videotapes of SMCTC meetings, written correspondence and reports in the course of conducting this investigation. The quality and caliber of staff members employed by the Commission, and their record of efficient and effective administration of duties and powers delegated to them by the Commission, are evidence of the SMCTC's initial good judgment and intent to carry out its mission with the assistance of quality staff support. The Grand Jury urges the Commission to take steps to ensure this record is maintained. 